IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. 498

MARYLAND CASUALTY COMPANY, et als.,
Petitioners-Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al,
Respondents-Appellants Below.

REPLY BRIEF FOR RESPONDENTS

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I.

INTRODUCTION

Respondents, the widows and orphans of the deceased seamen, not being able to afford multiple briefs, have requested that their Memorandum in opposition to the petition for writs be considered as the principal brief on this appeal. That memorandum carries respondent's affirmative argument, and this brief will be limited to a rebuttal of the arguments pressed in petitioner's brief.

II.

ARGUMENT

A. The Louisiana Direct Action Statute, like that of New York and presumably other States, is Applicable to Marine Insurance.

Petitioner's first argument is based exclusively on local interpretation of the applicability of the Louisiana Statute—a question of local law which would seem to be precluded here by the decision below and other decisions. The Civil District Court for the Parish of Orleans has specifically overruled exceptions of no cause of action based on the inapplicability of the Statute to marine insurance in at least two cases, *Lee v Westchester Fire Insurance Co. of New York*,[1] and *Department of Highways v Lykes Bros. SS Company*,[2] The District Court's interpretation is binding on this Court.[3]

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[1]Docket No. 308,690 (unreported). In this case an exception leveled by defendant at plaintiff's direct action suit specifically claimed that "it sets forth no right of action in that the policy allegedly issued by defendant . . . is a marine insurance policy under which no direct right of action can exist in favor of plaintiff," and similar arguments were made there as here. The Court, however, overruled the exception and held that the plaintiff could persue his direct action on a marine P & I policy.

[2]Unreported below but see 209 La. 381, 24 So. 2d 623 (1945).

[3]*Terminiello v Chicago*, 337 U.S. 1, rehearing denied 337 U.S. 934 (1940), where the Court held "that construction of the ordinance (by a Municipal Court) is a ruling on a question of State law that is as binding on us as though the precise words had been written into the ordinance." The holding in *Terminiello* case makes unnecessary arguing in detail that under the Louisiana Insurance Code, P & I insurance is not defined as "ocean marine" insurance excluded from a direct action by La. R.S. 22:611 as claimed in petitioner's brief at page 6, but is separately defined as "marine protection and indemnity insurance" in La. R.S. 22:6 (13) (e). Moreover, "ocean marine" insurance excluded generally from "The Insurance Contract" regulations of Part XIV of the Louisiana Insurance Code by 22:611 means traditional "ocean marine" insurance on ships, cargoes, and freights, and not the relatively new type of insurance against personal liability referred to as P & I insurance. See Arnould, MARINE INSURANCE AND AVERAGE, 13th Edition, Volume I,

The same argument was made with respect to the New York counterpart of the Louisiana Direct Action Statute and similarly rejected by the New York Courts in *Hansen v Continental Insurance Company of New York*[4] where, after securing a Jones Act judgment, and execution being returned unsatisfied, the injured person proceeded direct against the P & I underwriters pursuant to Section 109 of the New York Insurance law.[5] In overruling the defense that the New York Direct Action Statute was not applicable to marine insurance, the Court said at p. 421:

> ". . . No good reason is suggested for assuming that the provisions of Section 109 were not intended to apply to any policy issued by a stock company, then or thereafter authorized to insure against liability for personal injuries, whether on land or on sea.
>
> . . . That the traditional contract of marine insurance was one of indemnity for money actually paid or loss actually suffered, is no reason for exempting such policies from the operation of Section 109, when the companies issuing marine insurance choose to insure against loss arising from personal injuries. The same considerations of fairness and public policy which originally led to the enactment of Section 109 of the Insurance law . . . apply no less to the liability features of marine policies than to the policies originally contemplated by that section."

The Federal Court in New York similarly applied the direct action provision of the New York workmen's com-

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pp 10, 115-118, 345. Winter, MARINE INSURANCE, 2nd Edition, p. 252. Huebner, MARINE INSURANCE, Chapter XIII, p. 144 and 148.

[4]262 N.Y. 136, 186 N.E. 420 (1933).

[5]Now Section 167 of McKinney's Consolidated Laws of New York.

pensation insurance law to marine P & I insurance in *The Cascade.*[6]

Hence it appears, contrary to the statement of petitioners, that neither the legislature, nor the Courts of Louisiana or New York, recognize any constitutional impotence in applying direct action statutes to maritime causes of action.

B. The Louisiana Direct Action Statute Applied to this action impairs no obligation of any maritime contract, infringes no substantive feature of the general maritime law, and leaves unaffected the national Limited Liability Act.

1.

In the first place, the irreconcilability asserted on page 7 of petitioner's brief to exist between the decision of the Fifth Circuit Court of Appeals in this case, and in *Wilburn Boat Company v Fireman's Fund Ins. Co.*[7] and the alleged "open disagreement" between the judges of that court with respect to the question presented here, obviously does not exist, because the *Wilburn Boat Company* unanimous opinion cites the opinion in this case with approval!—saying:[8]

> "The right of a common law remedy so saved to suitors does not include attempted changes by the states in the substantive admiralty law. *Cushing v Maryland Cas. Co.*, 198 F. 2d 536,538. There is and can be no doubt that *this suit* which challenges

[6]241 Fed. 206. The Federal District Courts in Louisiana have similarly so applied it in a number of cases, all unreported. See cases cited in Memorandum in Opposition to Petition, footnote 11.

[7]201 F 2d 833 (CCA 5, 1953).

[8]Id, at p. 837.

> the validity and effect of the terms of a maritime contract *does* involve a characteristic feature of substantive admiralty law". (Emphasis added)

Thus the new panel of judges of the Fifth Circuit approved the decision in this case, and distinguished the *Wilburn Boat Company* case from this on the ground that here, as in *Just v Chambers*,[9] and in *Red Cross Line v Atlantic Fruit Company*[10] referred to just above in the opinion, the state law involved affected not "a characteristic feature of substantive admiralty law," as in the *Wilburn* case, but merely a procedural or remedial remedy.

Pretermitting completely the question decided in the *Wilburn Boat Company* case of whether a state statute can impair the terms of a maritime contract involving a characteristic feature of admiralty law because that question is not in any way involved in this case, it would seem perfectly clear that insurance companies cannot regulate state remedies and state procedures by the terms of their contracts. The Constitution of the United States certainly does not give to insurance companies the right to regulate the remedies and the procedures in the courts of the State of Louisiana contrary to the will of the legislature and in violation of its laws, simply by inserting a contrary procedural or remedial provision in its policy!

The assertion that the Louisiana direct action statute impairs any enforceable obligation of a maritime contract is certainly to stretch the imagination. A contract with whom?—With the State of Louisiana that it would not adopt remedial laws inconsistent with or contrary to the

[9]312 U.S. 383.
[10]264 U.S. 109.

provisions of the contract? But there is no such contract! A contract with the insured? But the insured is not suing —and certainly a contract between the assured and his underwriters cannot bind either the legislature of Louisiana as to what its remedial laws applicable to suits on that contract should provide, or a third person's right to assert them. It must be emphasized that we are not concerned here with a suit between the parties to the insurance contract, as was the case in the *Wilburn Boat* proceedings fallaciously relied upon by petitioner, where the Court perhaps properly held that a state statute inconsistent with the general admiralty law could not affect substantive maritime contractual provisions based on such maritime law. Here we are concerned only with remedial rights as properly pointed out in the *Wilburn* case affecting state remedies expressingly saved to suitors by the Judiciary Act,[11] and the McCarran Act,[12] and beyond the reach of private contracts, maritime or otherwise. Hence the numerous decisions cited by petitioner of the supremacy of maritime law over local state substantive law are wholly inapplicable to this case. To the contrary, the line of decisions of this Court characterized by *Red Cross Line v Atlantic Fruit Company*[13] and *Just v Chambers*[14] is properly applicable.

C. The Limitation of Liability proceeding does not preclude the applicability of the Louisiana Direct Action Statute.

1.) The Direct Action Statute is no bar to this Suit.

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[11]28 U.S. C. 1333.
[12]15 U.S.C. 1011, 12.
[13]*Supra*, note 10.
[14]*Supra*, note 9.

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There is no bar of the Louisiana direct action statute. Petitioners misconceive completely the function and purposes of the Limited Liability Act. They speak of it in terms of a "bar" to the liability of the vessel owner. But a plain reading of the act shows that it is not a bar at all but simply a method of proceeding. In fact, in the limited liability proceeding, the owner's entire liability to the injured person is determined and then simply scaled down or reduced to an amount which "should not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[15] An award must therefore be made to each claimant for the total amount of his injuries or damage, and then if "the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each (claimant)) . . . they should receive compensation from the owner of the vessel in proportion to their respective losses."[16]

Thus there is no bar—but simply a reduction of liability entirely personal to the owner. Indeed under the Louisiana Direct Action statute, once the judgment is rendered in the limitation proceeding fixing the amount of the damages of the claimant, then same would appear to be, in the language of other portions of the Louisiana Direct Action statute,[17] "*prima facie* evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer." Thus respondents would appear to be entitled to recover against petitioners in all events in a derivative action, as in *Hansen v Continental Ins. Co., supra.*

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[15]See 46 USC 183 (a), 184.
[16]46 USC 184.
[17]La R.S. 22:655.

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The ship owners' right to limit his liability is obviously an immunity personal to him as owner,[18] completely independent of the tort, and similar to the personal defenses of interspousal immunity,[19] soverign immunity,[20] and eleemosynary immunity,[21] held unavailable to liability insurors under the Direct Action statute by the Louisiana Courts.

2.) There is no Federal bar to this suit.

The inapplicability to this case of the decision of this court in the *City of Norwich* has already been pointed out, and little can be added to what has already been said by the Fifth Circuit Court of Appeals and in our Memorandum in opposition to the petition for writs herein.[22] *Flink v Paladini*[23] relied upon by petition in this case is obviously inapposite because there this court was protecting the very persons Congress intended to protect by piercing the corporate veil in precisely the same way that the California Statute itself pierced it. The stockholders were the ultimate owners both of the corporation and of the vessel involved, and the very parties Congress intended to protect. There is not even any suggestion that Congress intended to protect marine P & I underwriters by the Limited Liability Act. Similarly, with respect to the cases limiting recovery on surety and release bonds,[24] not only are such bonds posted in contemplation of limitation proceedings, but the personal liability of the owner indemnifies the

[18]See *American Car & Foundry Co. v Brassert*, 289 US 261 (1933).
[19]*Edwards v Royal Indemnity Co.*, 182 La. 171 (1935).
[20]*Rome v London & Lancashire Indemnity Co.*, 169 So. 132 (1936) *Brooks v Bass*, 184 So. 222 (1938).
[21]*Lusk v U.S. Fidelity & Guaranty Co.*, App. 1941, 199 So. 666.
[22]See Memorandum pp 18-20.
[23]279 U.S. 59.
[24]*Societé Napthés Transports v Bisso Towboat Co.*, 241 Fed. 463.

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surety.[25] Hence again, to hold the surety beyond limitation would be to defeat the purpose of the limited liability statute by thus making the owner fully liable for indemnification. Here no such direct or indirect liability of the owner is involved because once having paid his P & I premium, which he must do in all events, the owner is not subject further to indemnify his P & I insurer.

Petitioner's argument that "marine underwriters obviously issue their policies in contemplation of the provisions of the limitation statute which are, in fact, written into such policies . . . through their 'no action' clause," and hence should receive the benefit of the limitation of liability statute,[26] is tantamount to a claim that underwriters can contract for an advantage against the public which Congress and the Legislature of Louisiana specifically denied them and allowed only to vessel owners. The implication that if the advantage of the no action clause is denied them, premiums would thereby be increased is effectively answered by Judge Learned Hand in his observation in *Keen v Overseas Tankship Corp.*[27] as follows:[28]

> "Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the premiums, in the end it will be likely also to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships."

Indeed, the socio-economic theory of spreading the risks adopted by the Louisiana Direct Action statute as applied here to the shipping industry, is a vast improve-

[25]See Louisiana Civil Code, Article 3052.
[26]Petitioner's Brief, pp 16, 18-19.
[27]1952 A.M.C. 241, certiorari denied 1952 A.M.C. 1281.
[28]Id. at p. 246.

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ment over the theory of the limited liability acts, and does no violence thereto, Those acts, a product of 19th Century legal economics conceived prior to the development of liability insurance as presently known,[29] hark back to European mediaevalism in an effort to foster and protect shipping, without benefit of modern day refinements in liability insurance, and crudely shift the loss and carnage incident to marine disasters and the shipping industry, from shipowners to those immediately involved. In the case of the seamen who man the ships, and their families—ever present in marine disasters and the class who can least afford to bear the loss—it falls with crushing brutality, particularly in the case of seamen of inland vessels who are denied even the shipowner's tonnage contribution to their injury or death.[30] Every other American industry has avoided such economic barbarism by the adoption of the modern insurance techniques for spreading the risks of industrial catastrophy.

The Louisiana Direct Action statute, as applied here, adopts and achieves the enlightened, more subtle, effective and economically sound 20th Century ideal of alleviating the distress of the impecunious victims of marine disasters by spreading the loss industrywide through liability insurance, in the tradition of workmen's compensation and unemployment compensation insurance laws. Certainly the cost thereof will show up in perhaps increased P & I insurance premiums. But as said by Judge Hand:

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[29]Marine P & I liability insurance in America is a relatively recent development (Huebner, MARINE INSURANCE, p. 144, 148, attributes it to growing out of Builders Risk Insurance. See also Arnould and Winter, op. cit. supra note 3), and at the time of the adoption of the Limited Liability Acts was available, if at all, only restrictively through British P & I Clubs.

[30]46 U.S.C. 183 (b), (f).

> ". . . it will be likely to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships."

Thus the Louisiana Direct Action statute leaves the shipowner fully protected by the Limited Liability Acts insofar as he is not insured, at the same time achieving for the impecunious seamen and their families a measure of protection against the crushing economic burden shifted to them by the imperfections of the 19th Century Limited Liability Acts by applying 20th Century theories of socio-economic insurance legislation to their plight.

D. The Jones Act does not preclude this Remedy.

The Court's attention is again directed to the discussion of this subject in our Memorandum in opposition to the petition herein.[31] In *Hansen v Continental Insurance Company of New York*,[32] the fact that the injured employee first recovered against the insured in a Jones Act action, and subsequently brought a second derivative direct action against the P & I insurer, did not even suggest to the New York Court that the Jones Act was being extended by permitting the second suit on the insurance policy under the New York Direct Action statute. If it is not an extension of the Jones Act to permit a second suit after execution on the first is returned unsatisfied, then it is certainly no extension to telescope the two together as the Louisiana Direct Action statute has done. The procedual difficulty in the *Hansen* case and the necessity for two separate suits under the New York Direct Action statute simply proves the propriety and facility of the Louisiana Direct Action remedy.

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[31]Pages 16-18.
[32]Supra, Note 4.

Finally, it must be emphasized that there are two facets to this suit only one of which involves a Jones Act action. This suit against Home Insurance Company as underwriters of the vessel owner, does not involve a Jones Act action at all, but is one arising purely and simply under the Louisiana wrongful death statute—Article 2315 of the Louisiana Civil Code.

E) The McCarran Act.

Petitioners take the flat position that the plenary powers of states to regulate insurance within their borders, including all the prior jurisprudence of this court supporting same, has been swept away by the decision of this court in the *Southeastern Underwriters Association* case,[33] and that neither Humpty Dumpty, all the king's horses and all the king's men, nor Congress nor the McCarran Act can put it back together again, at least so far as marine insurance is concerned. *Hooper v California*,[34] they say, has been overruled and Congress lacks constitutional authority to delegate to the states the regulation of marine insurance. The McCarran Act, it is argued, authorizing state regulation of "the business of insurance, and every person engaged therein," cannot constitutionally mean what it says, but must be restricted only to non-maritime insurance on the authority of *Knickerbocker Ice Co. vs Stewart*.[35] The petitioners conclude marine insurance must constitutionally be free from state regulation, and that both the Louisiana Direct Action statute, and the McCarran Act as authorizing it, are unconstitutional in their application to marine in-

[33] *United States vs Southeastern Underwriters Association*, 322 U.S. 533 (1944).

[34] 155 U.S. 648 (1895).

[35] 253 U.S. 149 (1920).

surance. Such extravagant claims are justified neither by the *Southeastern Underwriters* case nor the later developments in this field.

In the *Southeastern Underwriters* case, the majority opinion and even the dissenting opinions made it clear that the decision in that case as to the constitutionaltiy and enforceability of a federal statute regulating the business of insurance did not automatically wipe out the concurrent power of the states likewise to regulate insurance.[36] This is made crystal clear in the subsequent decision of this court in *Robertson v California*[37] where the court expressly stated:[38]

> "No such consequence has followed from the Southeastern decision. It did not wipe out the experience of the states in the regulation of the business of insurance or its effects for the continued validity of that regulation. . . . The commerce clause is not a guaranty of the right to import into a state whatever one may please absent a prohibition by Congress, regardless of the effects of the importation upon the local community. That is true whether what is brought in consists of deceased cattle or . . . unsound insurance."

In the first place, *Hooper v California* is expressly approved both in the *Southeastern Underwriters* case[39] and again in the *Robertson* case.[40] *Prudential Insurance Company v Benjamin*[41] decided the same day as the *Robertson* case certainly is no authority for restricting the scope of the McCarran Act. Indeed in the *Benjamin* case, the court

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[36]See 322 U.S. at p. 548, 588.
[37]328 U. S. 440 (1946).
[38]Id at pp 457-459.
[39]Op cit. Supra Note 33, p. 543.
[40]Op Cit. Supra Note 37, p 444 Note 6.
[41]328 U.S. 408 (1946).

expressly upheld a state tax which might otherwise have been considered discriminatory on the basis of the authority granted to the state via the McCarran Act.[42]

In brief, petitioner's argument of the inapplicability of state regulations to marine insurance is but a repetition in a somewhat new and ingenious setting of the threadbare demands for immunity from state regulation of insurance repeatedly and unsuccessfully advanced at least since *Paul v Virginia.* It is the old familiar refrain that insurance being national and international in scope can only be regulated on a national scale. Only the setting is new—the emphasis being placed upon federal admiralty powers in this case, rather than upon federal commerce powers as in prior instances.

But the incidents and implications of Congressional authority to regulate in the admiralty field, are essentially no different than its authority to regulate in the field of interstate commerce. If Congress can abnegate its authority in favor of the States over interstate commerce by the McCarran Act as *Prudential Insurance Company v Benjamin* clearly held that it could, it can equally abnegate its authority to the States in maritime fields as clearly authorized by *Cooley vs Board of Wardens*[43] and *Kelly v Washington*[44] by the same McCarran Act in the interest of that coordinated action between Congress and the States, recognized as constitutional in the *Benjamin* case. Indeed the *Benjamin* case specifically recognizes the McCarran Act as authorizing state regulation of insurance in the admiralty field as follows:

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[42]Id p. 421.
[43]12 How 299.
[44]302 U.S. 1.

> "The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of *Cooley v Board of Wardens.*"[45]

Indeed all of the considerations raised here by petitioners in an admiralty setting have been raised and answered adversely to petitioners in a commerce setting in the *Benjamin* case, and to translate the language of the commerce authorities into the jargon of the sea, we have but to refer to the long line of cases epitomized by *Western Fuel Co. v Garcia*:[46]

> "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

Thus Congress has legislatively determined by the McCarran Act that the regulation of marine insurance is local in character, will not work material prejudice to the characteristic features of the general maritime law, and does not interfere with its harmony and uniformity.

Indeed, it has long been suspected that the advocates of exclusive federal legislation for insurance, including

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[45]Op cit. supra Note 41 at page 431, note 39.

[46]257 U.S. 233 at p. 242. See also *Grant-Smith-Porter Co. vs. Rhode*, 257 U.S. 469; *Industrial Commission v. Nordenholt Co.*, 259 U.S. 263; *Miller's Indemnity Underwriters v. Braud*, 270 U.S. 59 (1926); *Alaska Packers Ass'n v. Industrial Accident Commission*, 276 U.S. 467 (1928).

marine, are not so interested in uniformity of regulation, as in no regulation at all! As said on the floor of Congress in the early debates on Federal regulation of insurance:[47]

> ". . . The agitation in favor of the Federal Government assuming control of insurance companies was begun by the insurance officials themselves . . . The insurance officials who have clamored for Federal control are the men who do not want any control at all. They want to get out from the power of the jurisdiction of the 45 legislatures of the 45 sovereign states. They want a lax, easy, nominal control that will not control . . . ."

Louis D. Brandeis, later a Justice of this Court expressed himself forcibly on the subject, saying:[48]

> "The sole effect of a Federal law would be . . . to free the companies from the careful scrutiny of the commissioners of some of the States. It seeks to rob the State even of the right to protect its own citizens from the legalized robbery present insurance measures subject the citizens, for by the terms of the bill a Federal license would secure the right to do business within the borders of the State regardless of the State prohibitions, free from the States' protective regulation."

In a calmer vein, this Court itself has recently said in the *Robertson* case:[49]

> ". . . if appellant's contentions were accepted and foreign insurers were to be held free to disregard

[47]Congressional Record, Vol. 40, Part 1, p. 605, remarks of Mr. Johnson. See also Mr. Stevenson's remarks, *id.* p. 597.

[48]Speech on behalf of Protective Committee of Policyholders, reprinted, 322 U.S. p. 594, footnote.

[49]*Robertson v. California*, 328 U.S. 440, at p. 459-60.

> (Louisiana's) . . requirements . . . not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce (*sic* Admiralty) clause nor the *South-Eastern* decision dictates such a result."

The McCarran Act, as observed in the *Robertson* case,[50] reinforces and confirms that the regulation of marine insurance companies, and the remedial laws concerning the enforcement of their policies, such as the Louisiana Direct Action statute, is a matter of local concern, not working any material prejudice to the characteristic features of the substantive admiralty law, and hence constitutionally unobjectionable. That both the McCarran Act, and Louisiana's Direct Action Statute, are constitutionally applicable to marine insurance as the type of coordinated action between Congress and the States specifically approved in *Prudential Life Insurance Co. v. Benjamin*, is therefore unquestionable.

III.

CONCLUSION

It is therefore respectfully submitted, on the basis of

[50] *Id.*, at p. 461-2.

the reasons and authorities submitted here, and in our Memorandum in opposition to the petition herein, that the decision of the United States Court of Appeals for the Fifth Circuit herein should be affirmed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of this reply brief was mailed to Eberhard P. Deutsch, Deutsch, Kerrigan & Stiles, Hibernia Bank Building, New Orleans, Louisiana, on this the 24 day of April, 1953.

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